Chicago-Kent Law Review

Volume 28 | Issue 4 Article 4

September 1950

Recent Illinois Cases

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CRIMINAL LAW—VENUE—WHETHER OR NOT PROVISIONS OF STATUTE REGULATING CHANGE OF VENUE APPLY TO MOTION IN NATURE OF WRIT OF ERROR CORAM NOBIS—A procedural point of some slight interest, presented to the Illinois Supreme Court through the medium of the case of *People* v. *Sheppard,*[1] arose as the result of the filing of a motion in the nature of a writ of error coram nobis by a convicted defendant who was seeking a new trial. The defendant had been indicted, tried, convicted, and had had his conviction affirmed on writ of error.[2] He thereafter presented his motion in the nature of a writ of error coram nobis in the trial court, which motion was assigned to the same judge who had presided over the original trial. Defendant then sought a change of venue on the ground of prejudice on the part of the trial judge, asserting it to be a mandatory duty resting upon such judge to grant his request either by reason of Section 18 of the Venue Act, applicable to criminal proceedings, or under Section 1 of the same statute, if the proceeding was to be deemed civil in nature.[3] Both the request for change of venue and the motion in the nature of a writ of error coram nobis were denied,[4] and these rulings were sustained when the Supreme Court held that the provisions for change of venue were inapplicable to proceedings in the nature of error coram nobis. Although the precise question had not previously been decided in this state, the court had little trouble in attaining a solution without searching for precedent. As the purpose of both the common law writ of error coram nobis[5] and of its modern counterpart under Section 72 of the Civil Practice Act[6] was to present to the court which rendered judgment facts which were not placed in evidence at the original trial but which would have necessarily altered the decision if they had been presented, it would logically follow that only the court rendering the judgment should pass on the point as it alone would realize the full significance of such new facts. It was, therefore, said that to require the granting of a request for change of venue would

[1] 405 Ill. 79, 90 N. E. (2d) 78 (1950).

[2] See People v. Sheppard, 402 Ill. 411, 84 N. E. (2d) 377 (1949).

[3] Ill. Rev. Stat. 1949, Vol. 2, Ch. 146, §§ 1 and 18.

[4] The state moved to dismiss the motion, which had been filed pursuant to Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196, on the ground that it did not state facts within the purview of the statute but more nearly sought a review of evidence previously introduced.

[5] See State ex rel. Emmert v. Gentry, 223 Ind. 535, 62 N. E. (2d) 860, 161 A. L. R. 532 (1945); 49 C. J. S., Judgments, § 316; Black, Judgments, Vol. 1, § 300; Holdsworth, Hist. Eng. Law, Vol. 1, p. 224.

[6] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196.

serve to defeat the very purpose for which the writ of error coram nobis was created. There may be some occasion to consider, however, that if a full assimilation has not occurred between Section 72 of the Civil Practice Act and other related statutes, further legislative action, at least in this instance, might be desirable.

EVIDENCE—WEIGHT AND SUFFICIENCY—DEGREE OF EVIDENCE CONCERNING SURVIVAL NECESSARY TO TAKE CASE OUT FROM OPERATION OF UNIFORM SIMULTANEOUS DEATH ACT—In the recent case of *Prudential Insurance Company of America* v. *Spain*,[1] the Appellate Court for the Fourth District delivered an opinion which required that interpretation be given to certain clauses of the Illinois statute modelled on the Uniform Simultaneous Death Act.[2] The suit was in the nature of an interpleader action brought by an insurance company to determine the rightful person entitled to receive the proceeds of four insurance policies. Two of the policies had been issued on the life of a man, the other two on the life of his wife, each insured naming the other as beneficiary. Both the husband and wife were killed as the result of a collision between their car and a train. Immediately following the collision, two members of the train crew, by observation and other lay investigation, came to the conclusion that the husband was dead, but that the wife, although dying, was still alive. The wife's estate claimed the proceeds of the four policies, while the husband's estate, asserting the applicability of the statute in question,[3] argued that, as there was no "sufficient evidence" that the husband predeceased the wife, the funds should go severally to the estates of the insured parties.[4] At the trial of the interpleader action, the wife's estate had the benefit of the train crew's testimony

[1] 339 Ill. App. 476, 90 N. E. (2d) 256 (1950).

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, §§ 192.1-4. The statute, first enacted in 1941, was based on a proposed Uniform Simultaneous Death Act: Unif. Laws Anno., Vol. 9, p. 659 et seq. Some thirty-eight states have adopted the uniform law or some variation thereof: Unif. Laws Anno., Vol. 9, 1950 supp., p. 252.

[3] Section 1 of the uniform law, identical with Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 192.1, reads: "Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as otherwise provided in this article."

[4] Section 4 of the uniform law, also enacted in Illinois, declares: "Where the insured and the beneficiary in a policy of life or accident insurance have died, and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policies shall be distributed as if the insured had survived the beneficiary." See Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 192.4. While the uniform statute generally was designed to abrogate certain artificial presumptions, the retention of an arbitrary presumption as to life insurance contracts was deemed appropriate as most nearly approximating the intention of the real party in interest, *i. e.* the insured: Commissioners' Prefatory Note, Unif. Laws Anno., Vol. 9, pp. 657-8.

while the husband's estate relied on expert testimony to the effect that death could be determined only by the use of a stethoscope. The judgment of the trial court awarded the proceeds of all four policies to the wife's estate and, on appeal, that judgment was affirmed.

The Appellate Court, when determining that the testimony of the members of the train crew was "sufficient evidence" to take the case out of the operation of the Simultaneous Death Act, reached that conclusion on the basis that the phrase "no sufficient evidence" appearing in the statute did not change the rule that a preponderance of evidence is usually enough to prove a particular fact, including the fact of the time of death. Since this would appear to be the first time that this particular phrase has been passed upon, in Illinois or elsewhere, the actual effect of this decision is of interest. Prior to the adoption of the statute, there was, in cases of common disaster, no presumption of survivorship in Illinois, so survivorship, like any other fact, had to be proven by a preponderance of competent evidence.[5] Under the interpretation now given to the statute, the evidentiary requirements set forth in earlier decisions have not been changed in any respect. A mere preponderance of evidence tending to prove that one party survived the other will, therefore, suffice to by-pass the operation of the statute. That result would appear to be proper inasmuch as the statute was intended to operate, and by the instant case has been limited in its operation, to cases where there is no evidence whatever of survivorship.[6]

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OR NOT EQUITY MAY GRANT INJUNCTIVE RELIEF AGAINST A PENDING CASE WHEN THE PETITIONER MIGHT HAVE ACCOMPLISHED THE SAME RESULT BY AN EQUITABLE DEFENSE ASSERTED IN THE PENDING ACTION—The plaintiff-lessee, in *Bartelstein* v. *Goodman*,[1] sought an injunction to prevent prosecution, by the defendant-lessor, of a forcible detainer action then pending in another court. The complaint charged an attempt by the lessor wrongfully to terminate the lease on the basis of an alleged default under a covenant to keep a theater building and its improvements in first class condition and to make special repairs. Plaintiff alleged that the true reason for default, if there was one, lay in the lessor's procrastination over approving certain proposed changes; that the lessor

[5] Modern Woodmen of America v. Parido, 335 Ill. 239, 167 N. E. 52 (1929). Lay testimony concerning death is competent evidence, according to In re Herrman, 75 Misc. 599, 136 N. Y. S. 944 (1912), affirmed in In re Laffargue's Estate, 155 App. Div. 923, 140 N. Y. S. 743 (1913). The last mentioned case closely approximates the instant one in factual content, but no uniform statute had been proposed at the time of that decision.

[6] See Commissioners' Prefatory Note, Unif. Laws Anno., Vol. 9, p. 657.

[1] 340 Ill. App. 51, 90 N. E. (2d) 796 (1950).

had possession of a deposit more than ample to indemnify against any alleged injury; and that the only objective of the forcible detainer action was to accomplish a forfeiture of the lease. The defendant-lessor, by suitable motion to dismiss for lack of jurisdiction,[2] argued that since the plaintiff might have interposed an equitable defense to the forcible detainer action[3] the remedy at law was "adequate" and there was no reason for equity to take jurisdiction. Upon denial of that motion, plaintiff obtained a temporary injunction against further prosecution of the law action. On appeal therefrom, the Appellate Court for the First District affirmed the holding.

While it has been held that an equitable defense may be submitted for consideration in a forcible detainer action,[4] it does not necessarily follow that a court of equity is precluded from giving relief to prevent forfeitures when proper circumstances warrant equitable interference. The Civil Practice Act does not alter the equitable character of matters heretofore within the cognizance of a court of equity,[5] nor have substantial distinctions between actions at law and suits in chancery been abolished.[6] In two previous cases, decided since the adoption of the Civil Practice Act, appellate courts in Illinois have approved injunctions restraining the prosecution of forcible detainer suits,[7] but it does not appear that the adequacy of the legal remedy was there put in issue. Now that the point has been directly raised, the present adjudication acknowledges the power of a court of equity to enjoin the prosecution of a forcible detainer action despite the fact that the plaintiff seeking equitable relief might have used the same matter as an equitable defense in the action restrained. Since Section 44 of the Civil Practice Act is cast in permissive terms rather than mandatory ones,[8] the outcome of the instant case would seem to be eminently correct. The choice being one belonging to the defendant, the plaintiff in the law action should not be allowed to dictate how that choice is to be exercised.

[2] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 172(b).

[3] Ibid., Vol. 2, Ch. 110, § 168. That section is applicable in forcible detainer actions, originally excluded from the operation of the Civil Practice Act under Ch. 110, § 125, by reason of Ill. Rev. Stat. 1949, Vol. 1, Ch. 57, § 11, which calls for uniformity in procedure except where special statutory regulation exists.

[4] See Northern Trust Co. v. Watson, 310 Ill. App. 263, 33 N. E. (2d) 897 (1941), and Coyne v. South Shore DeLuxe Laundry, 299 Ill. App. 275, 20 N. E. (2d) 117 (1939). But see State Bank of St. Charles v. Burr, 283 Ill. App. 337 (1936), criticized in 25 Ill. B. J. 79. The same rule applies to ejectment actions according to Horner v. Jamieson, 394 Ill. 222, 68 N. E. (2d) 287 (1946), noted in 25 CHICAGO-KENT LAW REVIEW 232.

[5] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.10.

[6] See Frank v. Salomon, 376 Ill. 439, 34 N. E. (2d) 424 (1941).

[7] Kahn v. Loeffler, 339 Ill. App. 276, 89 N. E. (2d) 749 (1950); Waukegan Times Theater Corp. v. Conrad, 324 Ill. App. 622, 59 N. E. (2d) 308 (1945).

[8] Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 168, states: ". . . the defendant *may* set up in his answer any and all cross-demands whatever, whether in the nature of . . . cross-bill in equity or otherwise." Italics added.

INSURANCE—THE CONTRACT IN GENERAL—WHETHER IT IS POSSIBLE TO CONSTRUE AN EXTENDED COVERAGE ENDORSEMENT ON A FIRE POLICY SO AS TO ALLOW THE INSURED TO RECOVER THE FACE AMOUNT THEREOF FOR EACH PERIL COVERED WHEN TWO OR MORE LOSSES OCCUR INVOLVING DIFFERENT RISKS—Construction of an extended coverage endorsement on a fire policy became necessary in the case of *Oller* v. *New York Fire Insurance Company,*[1] a case which takes on significance in that it represents the first time that the highly standardized endorsement in question has been subject to construction in this state. The plaintiff there concerned took out a fire policy with the defendant on which he later obtained extended coverage by way of endorsement. The endorsement provided, among other things, for the additional perils covered, one of which was loss by windstorm; declared that the amount of the insurance was not increased; stipulated that the additional perils would be substituted for the word "fire" in the policy when the case required; and recited that the endorsement was to form part of the policy. While the policy was in effect, the plaintiff suffered a windstorm loss which amounted to a sum less than the face amount of the policy, and was paid for such loss. Subsequently, a fire loss occurred which exceeded the amount of the policy. Upon defendant's refusal to pay more than the difference between the face of the policy and the windstorm loss already paid, plaintiff brought action for the full amount of the policy. Plaintiff succeeded in the trial court, apparently on the theory that the policy and the endorsement constituted two severable contracts and for the additional reason that under the "substitution of terms" clause the plaintiff could substitute each added peril for the word "fire" in the policy itself, thereby insuring against each peril up to the face amount of the policy. On appeal, the Illinois Appellate Court for the Fourth District reversed on the ground that the endorsement prohibited increasing the amount of insurance, that there was but one contract, and that the endorsement did nothing more than extend its protection to the added perils. The court refused to apply the familiar rule of construction that ambiguities should be construed most favorably to the assured[2] because no ambiguity was said to exist. The rider in question must be understood to provide for no more than one sum of protection equivalent to the face of the policy, regardless of the peril or combination of perils which may cause loss, unless the policy be reinstated in full upon payment of an additional premium after compensation in part has been made.

[1] 339 Ill. App. 461, 90 N. E. (2d) 241 (1950).

[2] Joseph v. New York Ins. Co., 308 Ill. 93, 139 N. E. 32 (1923).

JOINT STOCK COMPANIES AND BUSINESS TRUSTS—OFFICERS AND COMMITTEES—WHETHER OR NOT A LIQUIDATION TRUST MANAGER MAY BE COMPELLED TO ACCOUNT FOR PROFITS REALIZED FROM OPEN MARKET PURCHASES OF TRUST CERTIFICATES—The recent case of *Victor* v. *Hillebrecht*[1] represents the first enunciation in Illinois concerning the right of trust managers of liquidation trusts to purchase beneficial participation certificates of the trust and retain the profits realized by such purchases. The trust agreement there concerned had been executed pursuant to a plan of reorganization instituted under Section 77B of the Bankruptcy Act[2] and was designed to produce an orderly liquidation of the trust res, a large apartment hotel. The trust managers were, by the agreement, authorized to submit, within their discretion, suitable offers for the sale of the trust res to the certificate holders and such offers were to be considered as accepted unless the holders of at least one-third of the outstanding certificates filed a written dissent within a specified time. The trust agreement provided that the trust managers could be holders of beneficial certificates showing participation in the trust and recognized the right of other holders to deal freely with the trust managers. The trust managers, for their own account, accumulated about fourteen per cent. of the total of outstanding units, part being obtained in exchange for bonds at the time of reorganization, but the major portion being acquired by subsequent purchases from a brokerage house which maintained an active market in the certificates. The value of the trust certificates having become enhanced by reason of higher bids for the trust res, certain of the beneficial certificate holders, who had not disposed of any of their certificates, brought an equitable action against the trust manager seeking, among other things, to compel an accounting of the profits realized by the defendants by reason of such purchases. The chancellor dismissed the suit for want of equity. Upon appeal, the Appellate Court for the First District reversed. The Supreme Court, however, after granting leave to appeal, reversed the Appellate Court and reinstated the decree of the chancellor.

In arriving at that decision, the Supreme Court deemed it highly significant that none of the plaintiffs had sold any part of their original holdings, either to the trust managers directly or upon the open market,

[1] 405 Ill. 264, 90 N. E. (2d) 751 (1950), reversing 339 Ill. App. 254, 90 N. E. (2d) 270 (1950).

[2] 11 U. S. C. A. § 207.

for which reason it could not be claimed that they had been injured by the purchase transactions.[3] On the contrary, it appeared that the plaintiffs were in a position to gain proportionately with the trust managers as the trust res appreciated in value. Plaintiffs, however, had relied on the familiar general rule which requires loyalty on the part of trustees and forbids secret dealing with the trust property.[4] That rule was held inapplicable to the instant case as the defendants were said not to possess any control over the sale of the trust units and other certificate holders were under no disability regarding the disposition of their interests to the defendants. Although there is much to be said for the view adopted by the Supreme Court in the instant case, keeping in mind the provisions of the trust agreement, it should be recognized that such a holding could lead to dangerous consequences, particularly if the trust managers should, by purchase or consolidation with others, acquire enough strength to block a liquidation. If that situation ever developed, the court would probably be inclined to investigate the bona fides of purchases made by the trust managers despite the apparent sanction of the trust agreement.

MUNICIPAL CORPORATIONS—TORTS—WHETHER OR NOT GENERAL STATUTE REQUIRING THE GIVING OF NOTICE TO MUNICIPAL CORPORATION OF FACT OF INJURY APPLIES TO CLAIMS ARISING UNDER STATUTE FOR SUPPRESSION OF MOB VIOLENCE—A problem of statutory integration grew out of the recent case of *Kennedy* v. *City of Chicago*[1] wherein the plaintiff sought to recover damages, for injury suffered by mob violence, from the municipal corporation because of its failure to suppress a riot.[2] At the ensuing trial, plaintiff gave no proof of notice to the municipal corporation of the type customarily given as a condition precedent to other tort actions[3] but, instead, took the position that no notice was required in mob violence cases since the particular statute imposed no such requirement.[4]

[3] For an analogous situation wherein a selling shareholder was permitted to sue a purchasing director, see Agatucci v. Corradi, 327 Ill. App. 153, 63 N. E. (2d) 630 (1945), noted in 24 CHICAGO-KENT LAW REVIEW 272.

[4] Kinney v. Lindgren, 373 Ill. 415, 26 N. E. (2d) 471 (1940), reversing 300 Ill. App. 610, 21 N. E. (2d) 332 (1939).

[1] 340 Ill. App. 100, 91 N. E. (2d) 138 (1950).

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 512 et seq.

[3] Ibid., Vol. 1, Ch. 24, § 1—11. It appeared from the statement of the case that a notice had been served prior to suit but such notice was defective for failure to include the residence address of plaintiff. Another notice, served after suit had been begun but within six months of the injury, one designed to correct the omission in the first notice, was excluded under the authority of City of Waukegan v. Sharafinski, 135 Ill. App. 436 (1907).

[4] It was argued that the legislature, by its silence on the point, had indicated a deliberate purpose to omit such requirement at the time of enacting the personal

The trial court ruled in plaintiff's favor as to such contention and granted plaintiff a judgment against the municipality. That judgment was reversed by the Appellate Court for the First District, and the cause was remanded with a direction to dismiss the suit, when it came to the conclusion that, by proper integration, it was necessary to read into the mob violence statute those provisions, noted above, to be found in the later general Cities and Villages Act, which provisions make notice an essential element in all personal injury cases.[5] That conclusion was reached on the basis that (1) the general provision was all-inclusive, except as to cases coming under other special statutory regulation,[6] and (2) the special provision in the property damage statute was necessary not so much to show an intention to excuse the giving of notice in personal injury cases growing out of riot as to conform the practice in property damage cases to that followed in other suits against municipalities. That rationale becomes the more evident when it is remembered that the general statute relates to cases based solely on injury to the person and has no application to property damage cases. As the later general provisions are so worded as to be all-inclusive, both as to notice and period of limitation,[7] the result achieved would appear to be an inevitable consequence of the necessary integration of statutory materials. The fact that such materials are distributed between civil and criminal statutes was deemed to be a matter of no moment.[8]

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injury by mob violence statute, Laws 1909, p. 190, Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 512 et seq., on the basis that specific provision for notice had been inserted in a prior law relating to damage to property caused by riot: Laws 1887, p. 237, Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 518 et seq., particularly § 523.

[5] A motion by defendant for a directed verdict must be granted if there has been a failure to give notice: McCarthy v. City of Chicago, 312 Ill. App. 268, 38 N. E. (2d) 519 (1941). An interesting sidelight concerning the applicability of notice provisions to minor plaintiffs appears in Martin v. School Board of Union Free Dist. No. 28, — N. Y. —, 93 N. E. (2d) 655 (1950), affirming 275 App. Div. 1042, 91 N. Y. S. (2d) 924 (1949), where it was held that proper and timely notice was essential even though the minor, because of extreme youth, was incapable of giving notice.

[6] It should be noted that the time permitted for notice under Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 523, in property damage by mob violence cases, is fixed at thirty days instead of the six-month period specified in the Cities and Villages Act for other cases.

[7] The reasoning used in the instant case could be carried over so as to require that suits for personal injury caused by mob violence should be begun within one year, pursuant to Ill. Rev. Stat. 1949, Vol. 1, Ch. 24, § 1—10, for no specific limitation period is fixed by Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 515.

[8] The imposition of civil liability on the municipal corporation in mob violence cases bears evidence of a survival of the ancient penalties imposed for failure to raise the hue and cry or to produce the slayer of a Norman. See Holdsworth, Hist. Eng. Law, 3d Ed., Vol. 1, pp. 15 and 294; Pollock and Maitland, Hist. Eng. Law, Vol. 1, p. 88, and Vol. 2, p. 578.

TENDER — PRODUCTION AND OFFER OF MONEY OR EQUIVALENT — WHETHER TENDER OF PAYMENT BY A CERTIFIED CHECK IS LEGAL TENDER UNDER OPTION TO PURCHASE REAL ESTATE FOR CASH—The case of *Margulus* v. *Mathes*[1] presented the Appellate Court for the Fourth District with the necessity of ruling on a problem, resolved in many jurisdictions,[2] but one never before decided in Illinois. Mathes had there given Margulus an option to purchase certain real estate at a stipulated price payable "in cash." Margulus decided to exercise the option, so the parties agreed to meet late on the last day of the option period to work out the details. At this meeting, Mathes tendered a deed and Margulus tendered two certified checks aggregating the total purchase price. Mathes rejected the tender, demanding cash as specified in the option and professing fear that the banks on which the checks were drawn might fail before the checks could be cashed. Margulus never tendered cash but instead, believing, that he had made legal tender, brought suit for breach of contract. The trial jury returned a verdict for the amount of plaintiff's damages but a motion for judgment notwithstanding the verdict was allowed. The Appellate Court affirmed that action, holding that, in the absence of an agreement to the contrary, money is to be regarded as the sole medium of payment. It was said that an effective tender had to be made in money, or that which by law passes for money, and that the payee had a right to so demand, regardless of his motive. As a check, whether certified or not, is not the equivalent of money in law, even though it may be a commonly used means by which cash may be obtained, the objection that no legal tender had been made had to be sustained. The decision, as previously mentioned, finds no precedent in Illinois law but it is in harmony with the view established in *Harding* v. *Commercial Loan Company*.[3] It was there decided that tender of an ordinary check would not be a legal tender and could be defeated by objection on the part of the creditor. The same view has now been taken as to a check which has been certified.

WILLS — RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES — EFFECT OF WIDOW'S RENUNCIATION OF WILL UPON SPECIFIC AND RESIDUARY DEVISES—The facts in *Gowling* v. *Gowling*[1] disclose that the testator died leaving the plaintiff as widow and a large number of collateral relatives, defendants therein, as his heirs at law. The decedent left an estate con-

[1] 339 Ill. App. 497, 90 N. E. (2d) 254 (1950).
[2] See annotations in 51 A. L. R. 393 and 23 A. L. R. 1284.
[3] 84 Ill. 251 (1876).
[1] 405 Ill. 165, 90 N. E. (2d) 188 (1950).

sisting of a substantial amount of personal property and three tracts of farm land. The testator's will provided that all of the real estate was to be placed in trust with his widow and one of his nephews as trustees, the widow to be entitled to receive the net income during her widowhood. Upon termination of the trust, one parcel of land was to go to the nephew who acted as trustee, a second was devised to a named grandnephew and grandniece in equal parts, and the third was to be divided among the remaining nephews and pieces, or their descendants, *per stirpes* and not *per capita*. The widow, apparently dissatisfied with the provisions of the will, filed her renunciation in proper time and elected to take her statutory share of the estate.[2] She later sought partition of all of the realty. The specific devisees, by way of defense as to their parcels, argued that the renunciation of the will by the widow should not operate to affect them in any way and that her lawful share, as widow, should be taken from the residuary estate. The lower court, however, following Section 16 of the present Probate Act,[3] held that the widow was entitled to a one-half interest in each item of real estate owned by the testator, including therein the lands which had been specifically devised. On direct appeal to the Supreme Court, a freehold being involved, that decision was affirmed.

The specific devisees placed reliance upon the holding in *Pace* v. *Pace*[4] wherein the court had held that, where legacies and devises had to be abated on account of a renunciation by the widow, legacies and devises of the same class were to be reduced proportionately, but if of different classes, residuary legacies and devises had to be abated before specific ones. The statute then in operation had provided that the widow, upon renunciation, was entitled to "one-half of *all* the real and personal estate."[5] Since that decision, however, the legislature repealed the old statute[6] and replaced it with the present provision, which uses the words "one-half of *each parcel* of real estate" of which the testator died seized.[7] That section being clear and unambiguous and it being necessary to give effect to the legislative intent expressed therein, the court arrived at the only possible conclusion when it decided that prior cases were no longer controlling. The potential effect of the instant case should, however, be borne in mind, particularly since the case represents the first construction which has been given to the substituted section since its adoption.

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 169.
[3] Ibid., Vol. 1, Ch. 3, § 168(b).
[4] 271 Ill. 114, 110 N. E. 878 (1915).
[5] Smith-Hurd Ill. Rev. Stat. 1927, Ch. 41, § 12. Italics added.
[6] Laws 1939, p. 4.
[7] Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 168(b). Italics added.

WITNESSES—COMPETENCY—WHETHER OR NOT A PERSON NAMED AS A DEFENDANT BUT NOT SERVED WITH SUMMONS IS TO BE REGARDED AS A "PARTY" WITHIN THE PROVISIONS OF THE DEAD MAN'S RULE—In the case of *Sanky* v. *Interstate Dispatch, Inc.*,[1] the Appellate Court for the First District was again called upon to interpret the meaning of the word "party" as that term is contained in the so-called "Dead Man's" rule.[2] The plaintiff therein had sued, in his capacity as administrator, to recover for the wrongful death of his decedent arising out of a collision between the plaintiff's automobile, driven by the decedent with plaintiff's permission, and a truck owned by the corporate defendant and driven by one of its employees. The employee had been named as a co-defendant with the corporate employer, but both the original and alias summons had been returned "not found" as to him. Plaintiff proceeded to trial against the corporate defendant, at which time the employee was produced as an occurrence witness to controvert the testimony of plaintiff's sole eyewitness. The employee was permitted to testify over plaintiff's objection that, being a party to an action brought by an administrator and not having been dismissed from the cause, the employee's testimony was inadmissible under the aforementioned statute. From a verdict and judgment for the corporate defendant, plaintiff took an appeal, but the judgment was affirmed on the basis of the holding in *Webb* v. *Willett Company*.[3]

It had been there held that a co-defendant whose interest had been finally determined by an unreversed judgment in his favor was, thereafter, no longer a "party" at a subsequent retrial of the action as to his former co-defendant and could, accordingly, testify without objection. The reasoning leading to that result was based on the proposition that a person is not, in legal contemplation, a "party" to an action unless he has a right to be heard therein and to control the proceedings thereof,[4] so that, once his interest has been determined, he ceases to have any right of control and therefore ceases to be a "party" to the action.[5] Following that theory, the court in the instant case concluded that, as the employee in question had not been served nor had entered an appearance, he had no right to be heard or to control the case in any manner, hence

[1] 339 Ill. App. 420, 90 N. E. (2d) 265 (1950). Leave to appeal has been denied.

[2] Ill. Rev. Stat. 1949, Vol. 1, Ch. 51, § 2, directs that no "party to any civil action, or person directly interested in the event, shall be allowed to testify therein of his own motion, or in his own behalf, . . . when an adverse party sues or defends as the . . . administrator . . . of any deceased person." The statute contains certain exceptions not here pertinent.

[3] 309 Ill. App. 504, 33 N. E. (2d) 636 (1941).

[4] The court quoted Greenleaf, Evidence, Vol. 1, § 535.

[5] See also Weaver v. Ritchie, 152 Ill. App. 130 (1909).

was not a "party" within the provisions of the "Dead Man's" rule. It would seem, therefore, that merely naming a person as defendant is insufficient to disqualify him as a witness and that disqualification does not attach until there has been service of summons[6] or appearance, which disqualification will cease when there has been a final determination of his interest.[7]

[6] The plaintiff, in the instant case, made no attempt to serve the employee, with summons when he appeared as a witness. Had plaintiff done so, a postponement of the trial might have resulted but plaintiff's purpose would have been subserved.

[7] Plaintiff also relied on the point that the employee was a person "directly interested" in the outcome of the case, so as to be disqualified, even if he was not to be considered a "party." That contention was rejected, except as to the point that the fact of employment might be shown to affect credibility, on the basis of the holding in Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991 (1904).